

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SCOTT THARP)	
Claimant)	
VS.)	
)	
K. C. GUNITE)	Docket No. 187,952
Respondent)	
AND)	
)	
CNA INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals from an Order entered by Assistant Director Brad E. Avery on May 28, 1997. The Appeals Board heard oral argument November 18, 1997.

APPEARANCES

Claimant appeared by his attorney, James R. Shetlar of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Frederick J. Greenbaum of Kansas City, Kansas.

ISSUES

This case comes before the Appeals Board on a post-award application for medical benefits. The application was filed as an application for a preliminary hearing. This is the second such hearing held after the Award in this case. The first hearing was held before Administrative Law Judge Alvin E. Witwer. Based upon the evidence presented at the first hearing, Judge Witwer ordered respondent to provide claimant additional treatment under the direction of Dr. John A. Pazell, M.D. Respondent appealed and the Appeals Board affirmed that Order on September 19, 1996.

In the course of providing treatment, Dr. Pazell has referred claimant to other physicians for evaluation. Two of those physicians expressed opinions in this that claimant currently suffers from a condition not related to his work injury. In one case, the physician expressed an opinion that claimant had reached maximum medical improvement and that he needed no further treatment.

A dispute also developed regarding whether Dr. Pazell remained the authorized treating physician or whether, through a combination of referral and/or agreement by the parties, Dr. Mark Bernhardt had become the treating physician. For these two reasons, the opinions by the referral physicians and the arguments that Dr. Bernhardt had been the authorized physician, respondent refused to authorize any further treatment by Dr. Pazell. Claimant's counsel responded by filing a second application for preliminary hearing, again seeking post-award medical treatment at the direction of Dr. Pazell. The Assistant Director agreed and entered an Order for continued treatment at the direction of Dr. Pazell. Respondent now appeals, contending that the evidence produced at the second hearing establishes that claimant's current need for medical treatment is not causally related to his earlier work-related injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For the reasons stated below, the Appeals Board concludes that the Order by the Assistant Director should be affirmed.

In ruling on this appeal, the Appeals Board has treated the appeal as one from a preliminary hearing. Accordingly, the Appeals Board's jurisdiction is limited to jurisdictional issues identified in K.S.A. 1996 Supp. 44-534a and other allegations that the Administrative Law Judge has exceeded his jurisdiction. K.S.A. 1996 Supp. 44-551. The Appeals Board views the issue raised by respondent as one concerning whether claimant's injuries arose out of and in the course of his employment.

Claimant injured his low back on July 2, 1993, while working for respondent. Respondent provided medical treatment including a lumbar laminectomy/discectomy at L5-S1. This surgery was performed by Dr. David A. Tillema on October 1, 1993. Respondent and claimant thereafter agreed to an award of benefits based upon a 16.5 percent permanent partial impairment to the body as a whole. In the agreement, claimant preserved his right to seek future medical benefits.

After the surgery by Dr. Tillema, claimant did not return to work with respondent but has worked for several different employers performing essentially the same job he performed with respondent. He has done work in connection with the construction of pools, including spraying Gunite, tying rebar, and setting forms. This work has involved heavy lifting.

At the time of the initial post-award preliminary hearing, respondent contended that claimant's need for medical treatment was caused by his subsequent work activities, not his initial injury in the course of his employment for respondent. Claimant testified that he had not done anything subsequent to his employment to aggravate or reinjure the back. He also described the symptoms as in the same area of the body but worse than they were at the time of his settlement of the claim. Claimant also presented the report from Dr. Pazell stating his opinion that the complaints are a continuation of the problems he observed back in June of 1994. On the basis of that evidence, Judge Witwer originally granted treatment with Dr. Pazell and the Appeals Board affirmed that decision.

Dr. Pazell has now referred claimant to Dr. Vito J. Carabetta. Dr. Carabetta finds that claimant's current problems are the result of an unrelated peripheral neuropathy. Dr. Pazell also referred claimant to Dr. Mark Bernhardt. Dr. Bernhardt states that in his opinion claimant suffers from a chronic sciatica and a degenerative disc disease. He concludes that claimant has reached maximum medical improvement and that further treatment will not likely be a benefit to the claimant. He does also suggest the possibility a neurologist may be of some benefit in diagnosing and treating the condition. Dr. Bernhardt referred claimant for an EMG with Dr. Donald K. Hopewell and Dr. Hopewell concludes, as did Dr. Carabetta, that the condition is peripheral neuropathy not associated with his work-related injury.

After the referrals, Dr. Pazell saw and evaluated claimant on March 11, 1997, and again on May 12, 1997. Dr. Pazell recommended a second EMG evaluation with Dr. Hopewell. He notes that claimant had no symptoms of peripheral neuropathy prior to his injury. In May, Dr. Pazell again recommended a second EMG with Dr. Hopewell to further delineate the peripheral neuropathy.

The Board views Dr. Pazell's records as indicating that further evaluation is appropriate for the work-related injury. Respondent points out that Dr. Pazell does not at this time express an opinion that the condition is work related. The Board notes, on the other hand, that he does not express a contrary opinion or change his earlier opinion. The Appeals Board finds convincing his suggestions that such evaluation be done. The Board therefore agrees with and affirms the Order by the Assistant Director.

AWARD

WHEREFORE, the Appeals Board finds that the Order entered by Assistant Director Brad E. Avery, dated May 28, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

c: James R. Shetlar, Overland Park, KS
Frederick J. Greenbaum, Kansas City, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director